

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION

UNITED STATES OF AMERICA,) DOCKET NO. 3:16-CR-221-6
vs.)
NICHOLAS FLEMING,)
Defendant.)

TRANSCRIPT OF SENTENCING HEARING
BEFORE THE HONORABLE MAX O. COGBURN, JR
UNITED STATES DISTRICT COURT JUDGE
JULY 8, 2019

APPEARANCES:

On Behalf of the Government:

CHRISTOPHER RICHARD FENTON, ESQ.,
WILLIAM HENRY BOWNE, III, ESQ.,
United States Department of Justice
Criminal Division, Fraud Section
1400 New York Avenue, NW
Washington, DC 20530

On Behalf of the Defendant:

MARK C. MOORE, ESQ.,
SAMANTHA K. LLOYD, ESQ.,
Nexsen Pruet, LLC
1230 Main Street, Suite 700
PO Drawer 2426
Columbia, South Carolina 29202

LAURA ANDERSEN, RMR
Official Court Reporter
United States District Court
Charlotte, North Carolina

1 P R O C E E D I N G S

2 MONDAY, JULY 8, 2019:

3 (Court called to order at 2:09:)

4 THE COURT: Good afternoon.

5 ALL COUNSEL: Good afternoon, Your Honor.

6 THE COURT: Okay. We will call the case of United
7 States versus Nicholas Fleming. Is the defendant ready?

8 MR. MOORE: Yes, Your Honor. This is Mark Moore and
9 Samantha Lloyd for Mr. Fleming, and he is ready.

10 THE COURT: All right. Thank you.

11 Is the government ready?

12 MR. FENTON: Yes, Your Honor. Christopher Fenton
13 and Bill Bowne for the government.

14 THE COURT: All right. Thank you.

15 All right. Mr. Fleming, if you would please stand.

16 Do you recall appearing before a United States
17 Magistrate Judge for the purpose of entering a guilty plea in
18 this case?

19 THE DEFENDANT: Yes. Yes, Your Honor.

20 THE COURT: These are going to be easy questions.
21 All I'm trying to do is to see what happened in the past in
22 determining voluntariness of your plea as we go forward. So
23 this is going to be the questions I ask:

24 Do you remember being placed under oath at that
25 time?

1 THE DEFENDANT: Yes, Your Honor.

2 THE COURT: Do you remember answering the questions
3 of the Judge?

4 THE DEFENDANT: Yes, Your Honor.

5 THE COURT: Do you remember that those questions and
6 your answers to those questions were contained on a plea
7 transcript form?

8 THE DEFENDANT: Yes, Your Honor.

9 THE COURT: Did you sign that form indicating the
10 answers you gave the Judge that day were true and accurate to
11 the best of your knowledge?

12 THE DEFENDANT: I did, Your Honor.

13 THE COURT: Did you tell the Judge the truth that
14 day?

15 THE DEFENDANT: Yes, Your Honor.

16 THE COURT: If I were to ask you the same questions
17 today would your answers be the same?

18 THE DEFENDANT: They would, Your Honor.

19 THE COURT: Thank you. Counsel, do you believe your
20 client fully understood the questions the Magistrate Judge
21 asked at the Rule 11 hearing?

22 MR. MOORE: Yes, Your Honor. I do.

23 THE COURT: All right. Thank you.

24 Mr. Fleming, did you answer the questions the way
25 you did, and are you going forward with your guilty plea today

1 because you did commit the crime you're pleading guilty to?

2 THE DEFENDANT: Yes, Your Honor.

3 THE COURT: All right. Thank you.

4 Then based upon those representations and the
5 answers given by the defendant at the Rule 11 hearing before
6 the magistrate judge, the Court affirms the Judge's finding
7 that the defendant's plea was knowingly and voluntarily made.
8 The Court also affirms the Judge's finding that the defendant
9 understood the charges, the potential penalties, and the
10 consequences of his plea.

11 Accordingly, the Court affirms the Magistrate
12 Judge's acceptance of the defendant's plea of guilty at the
13 Rule 11 hearing and accepts the same here today.

14 Did the government have a factual basis?

15 MR. FENTON: Yes, Your Honor.

16 THE COURT: Okay. And is that in the presentence
17 report?

18 PROBATION OFFICER: Yes, Your Honor.

19 THE COURT: All right. Thank you.

20 Does the defense stipulate that the Court may use
21 the offense conduct set forth in the presentence report to
22 form the factual basis?

23 MR. MOORE: We so stipulate, Your Honor.

24 THE COURT: Thank you. Based upon that stipulation
25 and the offense conduct as set forth in the presentence

1 report, the defendant's plea of guilty before the magistrate
2 judge, and the defendant's admissions in open court today, the
3 Court finds there is a factual basis for the entry of the plea
4 of guilty and enters a verdict and judgment of guilty in this
5 case.

6 Now, Mr. Fleming, your case was referred to the
7 United States Probation Office for the purpose of a
8 presentence investigation in the preparation of a presentence
9 report. The Court has now received that report. Have you
10 read that report?

11 THE DEFENDANT: Yes, Your Honor.

12 THE COURT: Have you gone over that report with your
13 attorney?

14 THE DEFENDANT: Yes, Your Honor.

15 THE COURT: Do you now believe you understand the
16 contents of that report?

17 THE DEFENDANT: I do, Your Honor.

18 THE COURT: All right. Thank you.

19 Counsel, have you gone over that report with your
20 client, and do you believe he understands the contents of that
21 report?

22 MR. MOORE: Yes, Your Honor. We went over it at the
23 time the report was initially issued. We went over it again
24 after the report was finalized, and we reviewed it again this
25 morning; he understands.

1 THE COURT: All right. Are there any objections to
2 the presentence report which remain outstanding today?

3 MR. MOORE: There are no objections from the
4 defense, Your Honor.

5 THE COURT: From the government?

6 MR. FENTON: None, Your Honor.

7 THE COURT: All right. Thank you.

8 Then the Court will accept the information contained
9 in the presentence report for the purpose of applying the
10 guidelines.

11 It would appear in the instant case that the
12 guidelines provide for a total offense level of 20, a criminal
13 history category of I, and a guideline sentencing range of 33
14 to 41 months.

15 Does the defense agree that that is the advisory
16 guideline for this case?

17 MR. MOORE: The defense agrees that that is the
18 advisory guideline for this case prior to any motion for
19 departure pursuant to 5K1.1, Your Honor. Yes, we do.

20 THE COURT: All right. Does the government agree
21 that that is the guideline?

22 MR. FENTON: Yes, Your Honor.

23 THE COURT: All right. Thank you.

24 Now, are there any motions for departures or
25 variances from the government?

1 MR. MOORE: Yes, Your Honor. Do you wish him to
2 remain standing?

3 THE COURT: He can sit down at this point.

4 MR. MOORE: Thank you.

5 THE COURT: Thank you. Yes, sir.

6 MR. FENTON: Yes, Your Honor. The government is
7 moving for a downward departure of about 50 percent, which
8 would put the sentencing guideline range at 15 to 21 months,
9 and the offense level at 14, in exchange for Mr. Fleming's
10 substantial assistance to the government.

11 THE COURT: All right. I will hear from the defense
12 on sentencing in the determination to the government's motion.
13 Go ahead.

14 MR. MOORE: And if it's acceptable to Your Honor, I
15 will talk about the government's motion in the context of my
16 overall presentation.

17 I'm sure that as the Court is aware from my
18 sentencing memorandum I'm going to ask for a little bit more
19 than 50 percent based on his cooperation because I truly
20 believe he's been one of the most cooperative defendants that
21 I've ever encountered, both when I was a prosecutor for
22 23 years and certainly since I've been out in private practice
23 for the last six.

24 But, Mr. Fleming, who I will refer to as "Nick" is
25 66 years old. He has three grown children. And he and his

1 now ex-wife were divorced after he was charged in this case.
2 I will talk a little bit more about that situation later.

3 As I know Your Honor has seen from her letter, he
4 has a 91-year-old mother who lives in Minnesota, and he tries
5 to spend as much time with her as possible.

6 Since shortly after he was charged and arrested in
7 this case, Your Honor, he got a new job with "Stop IRS Debt"
8 as a customer service representative. He really likes his
9 job, and he's advanced in the company since he was hired.

10 And as noted in the letters written by Kirsten Payn
11 and Rebecca Argall, who were his supervisors at the company,
12 they are aware of his conviction here. They are aware of his
13 guilty plea, but they believe that he is a valued employee and
14 they would like him to continue to work with their company.

15 As they noted in their letter and as I have noted in
16 the sentencing memorandum, if Your Honor decides to sentence
17 him to a term of active incarceration he will lose that job,
18 and he will lose along with it some ability to make
19 restitution payments. He would have to reapply after being
20 released from incarceration. If he were to be rehired, he
21 would start at the bottom no longer going at the position he's
22 at.

23 As I noted, and Your Honor has read the government's
24 motion for cooperation, one of the things that has struck me
25 about this case is, you know, I was a prosecutor for a long

1 time. And I didn't see a whole lot of people who were able to
2 do a whole lot of proactive cooperation after they got
3 charged, and after the fact that they were arrested it sort of
4 became known to folks. I've been shocked at his ability to
5 record conversations with people who were the targets of
6 government investigations, and in one case record
7 conversations with a gentleman named CJ Cumo, who is currently
8 charged in the Northern District of Texas, and I will talk
9 about him in a few minutes.

10 You know, when Mr. Fleming made the decision to
11 cooperate. I told him that it had to be all or nothing. That
12 he was either all in and would tell the government everything
13 or that he just shouldn't go down that road. And if he was
14 going to cooperate he had to do it 100 percent, and he jumped
15 in with both feet and he has done that.

16 He provided information about his co-defendants in
17 the Niyato case. As the government said, he was the fourth
18 defendant in. But he also testified in the trial that was
19 before Your Honor in January of last year.

20 And we were informed by the government that they
21 felt that he was one of their best witnesses because he called
22 it straight down the line. He was one of their first
23 cooperators. In fact, he was so helpful that at one point the
24 government thought about recalling him during their trial.

25 I know Your Honor had the ability to see him and

1 evaluate his truthfulness, but I am told by the government
2 that they were completely satisfied with his cooperation.

3 In addition to testifying in that trial, he has
4 participated in an investigation which has ultimately led to
5 the charging of Mr. Cumo and others in the Northern District
6 of Texas in connection with this Earthwater scheme which is
7 very similar to what happened in this case, Your Honor.

8 And he and his co-defendant fugitive Thomas Broyles
9 were directly involved in promoting and selling those
10 investments, and he provided substantial investigation about
11 it to the government.

12 He spent a lot of time on the phone with Inspector
13 Bodin, and he is also recorded on at least two separate
14 occasions meetings with CJ Cumo.

15 He facilitated approximately five to ten other
16 recorded conversations with the government and, at one point,
17 he even set up a mock investor meeting with the principal.
18 And he informed Mr. Cumo he met a potential investor at a yoga
19 studio and expressed he was interested in hearing the
20 Earthwater pitch, if you will, and he was able to record that
21 with Mr. Cumo.

22 So it is very, very likely that he will be one of
23 the government's primary witnesses in that case when it goes
24 to trial.

25 But the government has indicated to me -- when Your

1 Honor scheduled this sentencing -- I talked to the government
2 about potentially jointly moving for a delay in this
3 sentencing until after that trial. The government did not
4 want to do that, and I will speak to that in a few minutes.

5 And -- but he has provided substantial assistance
6 which we believe helped led to the charging in this case. His
7 cooperation didn't stop there.

8 There were defendants charged in the *United States*
9 *versus Andrew Tager, et al*, in the District of Utah. He
10 traveled to Salt Lake City on his own dime to meet with
11 investigators there, and he was interviewed in connection with
12 that case.

13 There is another gentleman named Robert Welch who
14 has been involved in investment scams for sometime. Mr. Welch
15 reached out to Mr. Fleming. Mr. Fleming was able to recently
16 record conversations with Mr. Welch, and he had previously
17 recorded other conversations with Mr. Welch. I don't know
18 what the government's current intentions are with respect to
19 Mr. Welch, but I am informed that he is someone who has been
20 of interest, at least to the government.

21 The government has, in this case, asked for a
22 50 percent reduction. I'm told by the gentleman from the
23 prosecution table that 50 percent is the maximum that the
24 fraud division will recommend in a particular case.

25 Now, we didn't have rules like that when I was an

1 AUSA in the District of South Carolina.

2 THE COURT: They have them here, though. Over here
3 it's, if you give some help it's 25 percent, and something
4 else is 30 percent, then 40 percent. We usually did go
5 50 percent when I was -- for extraordinary cooperation we
6 did -- we would do more. But we usually did 50.

7 But they got it -- my feeling on it is if somebody
8 agrees to cooperate at 100 percent and they don't get called
9 because everyone pleads guilty, they shouldn't be getting less
10 off than the guy who has to go testify. Now, if they have to
11 testify and don't do it all bets are off.

12 But the office here has a different way of looking
13 at it, and I take that into consideration and do what I think
14 I ought to do.

15 But more than 50 percent is unusual for me to give
16 off.

17 MR. MOORE: And I've been told that, Judge. You
18 know, it was unusual for me to recommend more than that when I
19 was an AUSA. But truly substantial cooperation, I would
20 submit, deserves a truly substantial reward here. And the
21 government is asking for a sentence within the 15 to 21 month
22 range. If you gave him the bottom end of that range, 15
23 months, I'm asking Your Honor for a little bit better, and I'm
24 asking for it because of the fact that he has cooperated and
25 he has testified.

1 THE COURT: How much prison time do you think he
2 ought to get?

3 MR. MOORE: Well, I would like to see him get no
4 active prison time, Your Honor. I understand that's a big
5 ask. Okay. I understand it's a big ask. I think that a
6 substantial term of house incarceration would be appropriate
7 in this case and there is one point --

8 THE COURT: But that's not really prison time. I
9 mean, I heard somebody once say that they had to be
10 incarcerated at home and would go to work and had to be home
11 at night. And I said, "I'm under that sentence."

12 MR. MOORE: Well, with Mr. Fleming, you know,
13 Mr. Fleming has something of an unusual situation with his now
14 ex-wife who chose to divorce him after she found out about
15 this case and then decided to allow him to live in the room.

16 The reason she decided to divorce him was because
17 they have always been interested in fostering, and then she
18 had a dream of perhaps adopting some children. And she was
19 concerned and told that she couldn't adopt children with a
20 husband who is a felon. She has since been told through
21 talking to people at another agency -- and so they divorced.
22 But she let him live at home. Okay.

23 And she wrote a letter to Your Honor, which, you
24 know, is one of the most honest letters I think I've read,
25 because, obviously, I didn't have any role in drafting it,

1 where she talks about their relationship and in the fact that
2 in the two years since she made the decision to divorce him
3 they have a really good relationship at this point.

4 And that she has talked to a new foster agency who
5 has agreed that if he doesn't have certain convictions, which
6 he does not have, that there is a possibility that they would
7 consider placing a foster child in that home. She sort of
8 been told, although it is not official, that if he gets no
9 jail time it's a better chance.

10 But, you know, his situation at home is different
11 than perhaps other situations. Maybe it's better or worse
12 that you're living with your ex-wife who you are no longer
13 married to. I don't know.

14 But in any event, one thing that is not mentioned in
15 the government's 5K motion, and I mentioned it briefly in my
16 memorandum because I think this is something I would
17 respectfully request that Your Honor take into consideration.

18 As I told you -- when I told him he had to
19 cooperate, I told him he had to do -- to not hold anything
20 back. There's a good friend of his who sold stocks with him
21 named Scott Dearborn. And Mr. Fleming likes Scott Dearborn,
22 felt sorry for him because he knew he didn't have the best
23 life and didn't really want to cooperate against him. But I
24 told him if you're going to cooperate you got to tell them
25 everything. So he did.

1 And his cooperation is what apparently, obviously,
2 made the government believe it had a sufficient case to charge
3 him. So they charged Mr. Dearborn in a superseding
4 indictment.

5 Mr. Dearborn chose to take his own life; very
6 unfortunate decision.

7 Mr. Fleming was very upset about that, as one might
8 imagine. I have told him many times that people don't take
9 their own life just because they get charged in a case. He
10 obviously had a lot of other issues going on. But that has
11 plagued him and weighed on him and it is something that will
12 bother him probably for the rest of his life. He did what he
13 agreed to do and he hasn't looked back.

14 So I would ask Your Honor to consider that when Your
15 Honor decides the appropriate sentence to impose.

16 You know, at least in some districts and I think
17 it's a practice in this district, sometimes you will give a
18 defendant a 5K and a Rule 35. With the government's promise
19 and request for a 50 percent reduction in this case, I believe
20 the government thinks that it no longer has any obligation to
21 reward Mr. Fleming with a Rule 35 if you sentenced him to
22 imprisonment, and he has to go testify in the Earthwater case.

23 I would ask you to consider the fact that he has
24 cooperated in that case and given Your Honor's own stated
25 views on the facts that, you know, you don't penalize people

1 who don't get called to testify at a trial because the other
2 people pled, he recorded conversations with the lead defendant
3 in that case. Okay. He has been cooperative. He's provided
4 substantial assistance in that case now before he ever --
5 before he would ever set foot in a courtroom.

6 And so I would ask Your Honor to consider rewarding
7 him for his cooperation in that case when Your Honor
8 sentences -- his full cooperation in that case when you
9 sentence him today.

10 I also, if Your Honor -- I also want to talk a few
11 minutes about the 3553(a) factors if Your Honor will permit me
12 a few minutes.

13 He is 66 years old. Okay. First time he's ever
14 been in court, never imagined he would be in front of court
15 being sentenced by a judge like Your Honor. But at 66 he is
16 less likely to recidivate based on all these studies that have
17 been done, and we reference those in our sentencing
18 memorandum.

19 He is a good person, okay, despite the fact that
20 he's made mistakes.

21 If you read the letters that have been written by
22 his family in one of the letters that sort of struck me is his
23 80-year-old neighbor who talked about what a good person he
24 is, and how he goes over and tends to her and helps her do
25 things like put up Christmas lights. That's the sign of

1 somebody who's a pretty good person, in my view, I would
2 submit.

3 So when we talk about the history and
4 characteristics of the offender, I think that is something
5 that I would ask Your Honor to consider.

6 I talk about job, because he has a good job now. If
7 you sentence him to jail he will lose it. There is a
8 possibility, I'm just speaking frankly, that he would get it
9 back. He will be making a whole lot less money, okay, and
10 that is going to make his ability to make restitution payments
11 harder for him.

12 He also was -- I know that the presentence report
13 talks about his problems with his prostate. Since the
14 presentence report was written, they actually discovered that
15 he had cancer. He had surgery. He is doing much better. He
16 appears to be cancer free, but it's fairly early in the
17 process.

18 And if Your Honor will permit me, give me one
19 moment, I do have a letter from his doctor which I would ask
20 to be allowed to hand up and give the government. I did not
21 have the letter at the time we filed the sentencing memorandum
22 or I would have included it.

23 May I approach, Your Honor?

24 THE COURT: Yes, sir. Yes, sir.

25 MR. MOORE: He still has residual issues, still

1 undergoing testing and treatment. If Your Honor chooses to
2 sentence him to a sentence of incarceration, which I would ask
3 Your Honor not to do, I would ask Your Honor to delay his
4 reporting a little bit so that he has an opportunity to make
5 sure that his incontinence and other issues are under control
6 before he goes to the BOP.

7 But he has a need for ongoing medical treatment and
8 the cancer could reoccur.

9 He's also been told because he has Medicare Part B
10 that he needs to try to continue to make those payments even
11 if he goes to jail. And so if Your Honor sentences him to a
12 term of incarceration, again, one of the reasons why I will
13 ask you to defer reporting is to give him some time to save up
14 some money and make some sort of substantial lump sum payment
15 before he goes away.

16 And again, I have talked about his familial
17 situation.

18 Right now if Your Honor were to give -- the
19 government is recommending a reduction of four levels --
20 excuse me -- six levels. If you gave him a reduction of nine
21 based solely on his cooperation and not based on any variance
22 or the 3553(a) factors that would put him in Zone B, which
23 would make him eligible for a probation with conditions of
24 confinement sentence.

25 If you gave him a reduction of eight levels that

1 would put him in Zone C which would be a split sentence, you
2 know, half time -- if Your Honor was amenable to this, half
3 time in the BOP, half time on home confinement.

4 But based on his cooperation, and the unique
5 circumstances of his offense, and him, and the fact that it
6 will be very challenging for someone who is 66 or perhaps 67,
7 at that point, with a felony conviction to get another job. I
8 would ask Your Honor to consider imposing a sentence of
9 probation with conditions of confinement for whatever time and
10 of whatever duration that Your Honor chooses.

11 I understand that there is a sentence in the
12 presentence report about the fact that because his guideline
13 range is in Zone D that he's not eligible for probation. Of
14 course, if Your Honor departs nine levels we no longer have
15 that issue.

16 In addition, I have always taken the position that
17 those are guideline provisions which are now advisory only.

18 And finally, I've also seen other judges get
19 creative by saying, okay, well, if I have to give someone jail
20 then I will sentence him to a term of time served. He spent a
21 day in jail when he was arrested in California and then put
22 him on supervised release thereafter.

23 THE COURT: I'm not a really very creative person.

24 MR. MOORE: It's something that I liked when I saw
25 it. And I perhaps liked it a whole lot better as a defense

1 lawyer than I did as an AUSA.

2 THE COURT: I had that same thing happen to me too.

3 MR. MOORE: Yes, sir. But so -- and I will have a
4 couple of concluding remarks, and we can certainly answer any
5 questions. But at this point I would like to let you hear
6 from Mr. Fleming if you would permit him a few minutes to
7 speak to Your Honor.

8 THE COURT: Yes, sir.

9 THE DEFENDANT: Good afternoon, Your Honor.

10 THE COURT: Yes, sir. Good afternoon.

11 THE DEFENDANT: I'd first like to apologize to you
12 and to the Court for even standing before you today. In my
13 66 years I never thought I'd be in this position. I
14 understand what I did was wrong, and I am truly sorry to the
15 innocent people that were harmed because of my laziness, my
16 greed to make an easy buck and without regard to the ultimate
17 consequences to those people.

18 There was a time I was involved in the securities
19 industry and marketing investments in an appropriate manner
20 adhering to all the licensing and reporting requirements. I
21 made an okay living as a salesman and a supervisor with
22 administrative duties able to support my wife and young
23 children. However, after a period of time I left that
24 industry and went in another direction.

25 I got a real estate license to work with major

1 developers marketing timeshares for about 10 years, and after
2 that eventually I was recruited once again to be involved in
3 selling investments but this time I'd not be personally
4 selling. With my skill set, they wanted me to manage and
5 administer a marketing office raising money for a private
6 company with the intention of taking them public.

7 After doing that for about two years the opportunity
8 ran out and I found myself looking for something else to do.

9 As my attorney's shared with you, a salesman and
10 friend of mine Scott Dearborn asked if I could find another
11 project for him to sell. He said he would give me an override
12 percentage on his sales just for bringing him a product and
13 administering any of the paperwork. So I did that.

14 Unfortunately the project I brought to him was
15 Niyato. That came to my attention from an old acquaintance
16 named Daniel Broyles, my fugitive co-defendant in this case.

17 I set up the marketing logistics and Scott sold
18 Niyato to about ten investors, of which I got an overriding
19 commission on his efforts.

20 And although I was aware of the commission structure
21 on that Niyato project was excessive and undisclosed in the
22 offering documents I chose to look the other way and let Scott
23 make those sales.

24 I suppose I was hoping based on the fact that
25 Broyles told me Stencil was advised by a lawyer in setting up

1 the prospectus that there was a chance that the net amount of
2 money received by Niyato would be sufficient enough to
3 implement a business plan and everyone could make some money.

4 We all know now that there was never a chance for
5 success, as has been proven. The principal of Niyato was
6 simply using the funds for personal gains, something that I
7 should have realized upfront.

8 After I agreed to cooperate and give any information
9 to any name that was -- I knew that was involved, Scott also
10 got indicted and became extremely depressed and took his life
11 at that time.

12 Scott's decision to make -- to take his life is
13 something that will haunt me for the rest of my life. I think
14 about him every day.

15 Looking back over my involvement in Niyato, it was
16 clear that although I was selling investors, I was involved --
17 I wasn't selling investors I was involved in. I'm guilty of
18 ignoring clear signals of fraud in that Niyato offering.
19 Consequently, I stand before you today for judgment.

20 I can only plead for mercy at this point. I've
21 been, as my attorney shared with you, battling prostate cancer
22 for ten months and had my prostate removed in late March, but
23 I'm not out of the woods yet, continuing testing for at least
24 a year.

25 Besides my health issues, I have a mother that is

1 turning 91 next month. She's in frail condition and I'm
2 hoping to spend as much time with her as possible before she
3 passes.

4 My attorney has also explained my family situation
5 to you, and it is my hope that my now ex-wife and I can
6 continue to repair our relationship and eventually foster or
7 adopt a child.

8 Your Honor, I've tried to cooperate to the fullest
9 extent in an effort to right the wrongs that I've caused. I
10 apologize to the Court, to investors, to my family, and my
11 friends for my action.

12 I ask that you consider my cooperation, my family
13 situation, my age, my health, and my need to continue to try
14 to earn an honest living when you sentence me today.

15 I am truly sorry and remorseful for the choices that
16 I've made and caused people financial and emotional harm. I
17 can truly say that I will never be involved in something
18 criminal again for the rest of my life.

19 I appreciate the opportunity to speak today and beg
20 you for leniency.

21 Thank you, Your Honor.

22 THE COURT: Thank you.

23 Let me hear from the government.

24 MR. FENTON: Thank you, Your Honor.

25 The government agrees that Mr. Fleming's cooperation

1 has been truly substantial, and the government also believes
2 that that is reflected in its request for a 50 percent
3 downward departure.

4 THE COURT: Are you making similar requests on the
5 remaining defendants on here today? In other words, what are
6 your recommendations on those? I mean, I've got them here.

7 MR. FENTON: On the two other defendants who are
8 being sentenced today?

9 THE COURT: Yes.

10 MR. FENTON: It would be the same, Your Honor.

11 THE COURT: The same?

12 MR. FENTON: Yes.

13 THE COURT: Is the level of cooperation the same?

14 MR. FENTON: Yes. Yes, Your Honor.

15 Mr. Fleming has done some things that are arguably
16 different but -- and let me just cover those here.

17 So Mr. Fleming pled guilty and began cooperating
18 within six months of the indictment. He provided information
19 regarding Niyato that led to the indictment of another
20 defendant, Mr. Dearborn, which Mr. Moore covered which was
21 unique. He also testified at trial against the Stencils and
22 Mr. Duke. He brought to the government's attention and
23 provided information about a then active high-yield investment
24 fraud that was being run out of Dallas, Texas, which has since
25 been indicted. There are six defendants in that case who have

1 been indicted to date. Mr. Fleming provided -- he was
2 debriefed on multiple occasions. He provided documentation
3 and, as Mr. Moore covered, he also provided proactive
4 assistance meeting with targets and also recording the calls,
5 and the government believes that that cooperation was truly
6 substantial and that for that he should get a 50 percent
7 reduction.

8 Nevertheless, the government still believes that
9 confinement, not probation, is appropriate under these
10 circumstances for a number of reasons.

11 The first being the nature and circumstances of the
12 crimes. These high-yield investment frauds are serious. They
13 are serious crimes. The goal here is to find people and take
14 as much money -- take as much of their money as they can.
15 There's no question of risk here. There's no question about
16 the possibility that the investment may or may not turn out
17 because there's a high risk of success. These frauds are
18 total scams from the start.

19 Here Mr. Fleming lied about how the proceeds were
20 being used. He knew from the start that 50 percent of the
21 money was going to go into his pocket and his co-conspirators'
22 pockets. That was something that he knew out of the gate. So
23 he knew this was a scam. There was no chance of success, zero
24 chance of success. And when a victim was defrauded and
25 invested their money, what would happen is Mr. Fleming and his

1 co-conspirators would then go back to those victims and ask
2 them for more money. That was something that was common in
3 this scheme and other schemes that we've seen as well.

4 Mr. Fleming testified at trial about other schemes
5 that he had been involved in around the same time, and we
6 talked about some of these schemes; Green Automotive was one
7 of the schemes, New Global -- New Global Energy, and some of
8 the other people. The co-conspirators who were also involved
9 in those schemes. This crew of individuals including Broyles
10 who is the fugitive defendant, and also Scott Dearborn who was
11 indicted but then took his life.

12 And Mr. Fleming also recruited people into the
13 scheme. He was recruited and he recruited someone else as
14 well. So those are things to take into consideration with
15 respect to the question of confinement versus probation when
16 you look at the nature and circumstances of the crime.

17 Another important factor here is the need to deter
18 these high-yield investment frauds. There is a low barrier to
19 entry. It basically requires a telephone and an email
20 account, which at least with respect to the email account is
21 free.

22 It's also easy to conceal your identity from your
23 victims which makes it easier to perpetrate these crimes.
24 It's fast money, as Mr. Fleming said, and the amount of money
25 that you stand to gain can be quite significant. You have a

1 50 percent commission and you get somebody to invest \$5,000,
2 you walk away with \$2,500, which is a lot of money to a lot of
3 people in this country. You get thousands of dollars in
4 commission.

5 So it's very important to deter other people also
6 from committing these types of crimes. And regulatory --
7 giving probation would essentially be equivalent in the
8 government's eyes to a regulatory violation or something of
9 that nature, which as Mr. Fleming said and testified at trial,
10 he had violated regulations and a regulatory agency had taken
11 actions against him. But that didn't deter him from
12 committing that crime and it doesn't deter other people as
13 well.

14 So it is important that people understand that doing
15 this, picking up the phone and calling someone that they can't
16 see them and that can't see them and asking for thousands of
17 dollars under false pretenses is a real crime and that can
18 lead to real jail time.

19 With respect to the reasons why Mr. Fleming is
20 asking for probation, there are primarily three.

21 One, is that it may increase the likelihood that his
22 ex-wife will be able to adopt in the future, that he needs to
23 monitor his ongoing health issues, and also that he currently
24 has a good job.

25 The impact, if any, of imprisonment on these is

1 speculative in many respects.

2 And also I think it's important to keep in mind that
3 the amount of time that the government is asking for in this
4 particular case is not a long amount of time. It's 15 months,
5 possibly 21 months at the most. We're talking about under
6 two years.

7 It's also important I think for the Court to
8 consider that Mr. Fleming can continue to monitor his health
9 when he is confined because the Bureau of Prisons has the
10 ability to continue to do that. Defense counsel has offered
11 no reason why that would not be the case or why that would be
12 unsatisfactory with respect to Mr. Fleming's health.

13 The last point I'll just address is the employment.
14 The government understands why Mr. Fleming would want to keep
15 his job. I think that the letter, the very nice letter that
16 was written by his current employer leaves open the
17 possibility that he can return to that job even after he
18 serves a prison term, though, as they say in the letter, it is
19 not something that they can necessarily guarantee. But that's
20 what we're talking about here, really, is whether or not they
21 can guarantee it. And there are lots of things in life that
22 are not guaranteed.

23 But nevertheless it is important that a sentence be
24 imposed that includes prison time so that people understand
25 that this crime, which is easy to perpetrate, should not be

1 committed. That other people should not be victimized.

2 Thank you, Your Honor.

3 MR. MOORE: Can I briefly respond, Your Honor?

4 THE COURT: Yes, sir.

5 MR. MOORE: The offense itself, Mr. Fleming didn't
6 set out to just willy-nilly defraud people. He wasn't the
7 Stencils who set up the scheme. Okay. He did look the other
8 way when he gets the prospectus that says that "X amount of
9 money is going to be paid in commissions." He knows enough to
10 know that something is up. Okay. But he's not someone who
11 just set out willy-nilly to defraud people and take their
12 money. Other defendants in this case did, but I think it is
13 important to draw distinction between those folks.

14 Just because you're a participant in a high-yield
15 investment fraud scheme does not, I submit, mean that you
16 should go to jail just because you are a participant,
17 particularly if you cooperate to the degree that Mr. Fleming
18 did.

19 I did not hear the prosecutor tell you that there's
20 a possibility of a Rule 35. They did not address that at all.
21 I think that the absence of that statement speaks volumes. I
22 think that they do not intend to do anything else for
23 Mr. Fleming after Your Honor sentences him.

24 Of course he will cooperate, and he will testify in
25 that case, but I don't see that he has much of a realistic

1 chance of reward.

2 When you hear the statements about deterrence, I
3 guess there's general deterrence and there's specific
4 deterrence. He doesn't need any other deterrence because he
5 has been deterred. He will never do this again.

6 I made similar arguments about, you know, general
7 deterrence when I was a prosecutor. I don't know that the
8 fact -- putting Mr. Fleming in jail for 12 to 15 months is
9 going to make somebody decide not to insinuate or involve
10 themselves in this type of investment fraud any more than
11 probation with conditions of confinement and a chunk of a
12 \$1.4 million restitution payment is going to defer those
13 folks.

14 THE COURT: Yeah, but the restitution payment, I
15 mean, that's pie in the sky. That will be -- I would hate to
16 be sitting around waiting for my restitution to come.

17 MR. MOORE: And I understand that, Judge. I mean,
18 you know, luckily there are other defendants in this case who
19 I hope have more money than he does because he doesn't have
20 much.

21 My point is that the government often says, "Well
22 you have to send somebody to jail because there's a need to
23 deter." I don't know that folks out there in the community
24 who are deciding to, you know, commit these crimes get
25 deterred by it. I mean, drug dealers get jail time every day

1 and there are, you know, you take five of them and there are
2 ten more waiting to take their place on the street corner. So
3 I just feel like I need to say that.

4 And I also feel like I need to point out that while
5 the restitution figure is substantial here, he personally made
6 about \$30,000. That's what he made as a result of this,
7 unlike some of the other defendants in this case.

8 So I'm simply asking Your Honor to look at him
9 individually and not just him as part of a collective.

10 I understand that Mr. Swerdlen and Ms. Saccamanno
11 also cooperated substantially.

12 I know that the only other defendant who has been
13 sentenced so far in this case is Mr. Sharp, but he's in a
14 completely different place than they are because he pled
15 guilty to another offense which had a \$10 million fraud amount
16 and got much more time. But it was because the guidelines for
17 that offense drove his range, not because he got 102 months
18 for participation in Niyato.

19 I would ask Your Honor to take all those facts into
20 account. I would respectfully submit that a sentence of 15
21 months or more is more than sufficient and greater than
22 necessary to provide just punishment for this offense.

23 And if Your Honor is considering active
24 incarceration, I would ask Your Honor to consider a sentence
25 of perhaps six months in jail and six months on home

1 confinement or 12 months and a day. I would ask Your Honor to
2 consider that to reward him substantially for all his
3 cooperation and to look at him as an individual.

4 THE COURT: Okay.

5 MR. MOORE: I'm happy to answer any questions if
6 Your Honor has any.

7 THE COURT: No. No. I think general deterrence is
8 the thing that's running what the Court's going to do. Most
9 of these folks, like your client, are probably deterred not
10 because of age. Because people can be pretty wild for a long,
11 long time. I had somebody come in and there was a fella in
12 here, I think he was 60 years old, and he said he was elderly.
13 The lawyer argued that he was elderly.

14 MR. MOORE: I just turned 57 so I'm never going to
15 make that argument because I don't think people that age are
16 elderly.

17 THE COURT: There are people who will make that
18 argument. I am not moved by that argument.

19 MR. MOORE: Understood, Your Honor.

20 THE COURT: But general deterrence is the real
21 problem with a crime like this, mitigated substantially by the
22 fact that he cooperated because you want people to cooperate.

23 We've got three people to sentence. Your arguments
24 will be the same on all three of these; 15 to 21 months?

25 MR. BOWNE: Yes, Your Honor.

1 THE COURT: Is there any difference in that? I
2 mean, this defendant is arguing that he cooperated in Texas.
3 Is this it for him?

4 MR. FENTON: Is this --

5 THE COURT: Will there be a Rule 35 after his --

6 MR. FENTON: No, Your Honor. Mr. Moore is correct.
7 The government does not anticipate filing a Rule 35 motion.
8 We think that the 50 percent that we are moving for is
9 significant, that it reflects his cooperation to date,
10 including what he would do if he were to testify at trial.

11 THE COURT: Yes, and I understand. I understand
12 that argument. I mean, it's when you've got somebody that's
13 looking at 20 years and you give them 50 percent off, you've
14 given them 10 years off. On this you're giving him about,
15 let's see, what's it 33 down to 15 would be about 18 -- about
16 a year and a half off.

17 MR. FENTON: Right.

18 THE COURT: It's when you get down in the lower
19 areas the Court's got -- it's a little more difficult to deal
20 with all of those issues about that.

21 MR. FENTON: Right, but I think --

22 THE COURT: I agree with you on the fact that there
23 needs to be some jail time on these. That's the problem that
24 the Court has in terms of deterrence, general deterrence. To
25 sit around and say, "Go on home and go about your business" is

1 just -- it's very difficult for the Court to do that. We do
2 have good medical care in the federal prison systems, not
3 necessarily here in the Mecklenburg County Jail. They do the
4 best they can. But they're not equipped to deal with real
5 serious medical issues.

6 MR. FENTON: Your Honor, I just want to add one more
7 thing before Mr. Moore speaks, which is that by giving the 50
8 percent now we're giving that upfront.

9 THE COURT: You're giving what now?

10 MR. FENTON: We're giving the 50 percent upfront.
11 If we're expecting Mr. Fleming will still testify --

12 THE COURT: Right. But if you --

13 MR. FENTON: -- he doesn't have to wait to get that
14 additional time off. So we're not moving for 40 percent --

15 THE COURT: Right. But if you put him up there and
16 he doesn't, I mean, you know, you can --

17 MR. FENTON: Right.

18 THE COURT: -- he would be in violation of his plea
19 agreement. If you got any other crimes out there -- I mean,
20 he has to follow his plea agreements in these cases. He has a
21 contract with the government, part of it is that limits his
22 exposure, limits the charges, limits things. I mean, it's not
23 just prison time that he waits on. He's got to do it. If he
24 doesn't do it, he's got a problem. So I do understand you're
25 counting on him to do that.

1 MR. FENTON: Right.

2 THE COURT: And I seriously doubt he would take the
3 stand and perjure himself after this because that would be
4 some real time and it's very, very difficult to cooperate
5 against your own perjury.

6 MR. MOORE: I would say, Your Honor, he's going to
7 cooperate. He is going to testify because he signed the deal,
8 and he's going to comply with it because that's what he agreed
9 to do. I simply make the point --

10 THE COURT: There's usually a stick there to.

11 MR. MOORE: I know there's a stick. There's no more
12 carrot but the stick is still there. I got that. I've
13 explained that to him. Although I didn't really need to
14 explain it, but I thought I should.

15 My point is that foreclosing a Rule 35 for someone
16 who you know is -- because they know that Mr. Cumo is almost
17 certainly going to trial. They've told me that. They believe
18 he's the one going to trial. They know that they will be
19 calling Mr. Fleming because they know that he recorded
20 conversations.

21 THE COURT: But what they've done is, they have a
22 policy that they're not going to go below 50 percent. So they
23 are giving him everything they can give him because that's
24 their policy. People have policies. They follow policies.
25 That's their business. Sentencing is my business. But that

1 is their policy, and they've got that, and they are following
2 that. And I don't blame them for doing that.

3 I'm trying to see what -- I've got two more
4 sentences to do after this.

5 MR. MOORE: Yes, sir.

6 THE COURT: I'm trying to parse this thing out
7 between the three individuals. We've got one person who is --
8 may not have been able to cooperate quite as much as your
9 client, but he's sicker. Then we've got a lady in this thing
10 who has been taking care of sick people. So I got all those
11 kinds of issues. It happens in about every case I get where
12 the people have done anything good I get to hear about all of
13 them.

14 Now I got to try to figure out between all of
15 this -- everybody's well represented in these cases which is
16 not always the case but in fraud cases we usually get the best
17 lawyers because there is usually a little bit of cash there.

18 MR. MOORE: In this case it was garnered by his
19 family members coming together with the funds to hire me.

20 THE COURT: That happens sometimes.

21 MR. MOORE: Yes, sir. But as I understand Your
22 Honor's point, I mean, they do have a policy and they have to
23 follow it.

24 THE COURT: Right. That's all they're saying.
25 They're not trying to be -- they're being upfront and honest

1 about it. They've gone as far as DOJ will let them. The U.S.
2 Attorney's Office here has a policy now.

3 MR. MOORE: Yes, sir.

4 THE COURT: When I was there it was, you can only
5 give what you can give. If you're the mule, you can only give
6 up what you know, 100 percent. If you're the king pin and you
7 flip on people, oh, you love it. I was there. You probably
8 were there.

9 MR. MOORE: I was --

10 THE COURT: Most guys flip and you can take down the
11 whole thing. But you can't treat this guy differently just
12 because he didn't know it because he wasn't as involved.

13 MR. MOORE: Yes, sir.

14 THE COURT: So it's 50 percent for full cooperation
15 and it better be full. And occasionally where somebody
16 endangered themselves by wearing a wire and going into the
17 organization and doing things that it was -- they could earn
18 something better. But, so everybody's got a policy. We had a
19 policy. It was just ours was a little bit easier on that. I
20 remember we were like the top five in the nation in drug
21 convictions and Atlanta called and wanted to know what we were
22 doing. And we told them we were giving 50 percent off.

23 They said, "We only give three levels."

24 I said, "Well, that means they can go to prison and
25 be a hero for 20 years or ghosts for 17 years and be a zero.

1 Try giving them 10 years off on that and they'll give up
2 Mama."

3 MR. MOORE: That's true, Judge. My only argument
4 is -- and I'm not faulting the government. They're doing what
5 their policy suggests. I'm simply arguing that as Your Honor
6 noticed --

7 THE COURT: I know.

8 MR. MOORE: -- you're the one who makes the decision
9 on sentencing --

10 THE COURT: I know. I got three cooperating
11 witnesses, all who have different reasons, different 3553(a)
12 factors as to why they want to not go to jail.

13 The problem I've got is general deterrence.

14 MR. MOORE: Yes, sir.

15 THE COURT: I've got a serious general deterrence
16 problem here.

17 MR. MOORE: And my only position is that fifteen
18 months is not going to deter anyone any more than 12 months
19 and a day or six and six --

20 THE COURT: But I do think prison time sometimes
21 does individually, sometimes it doesn't. I mean, there are a
22 whole lot of people for millions of dollars that would go to
23 jail for a few years and get three hots and a cot and then
24 come out and take the money if they knew they could get that.

25 MR. MOORE: Right. No, Your Honor is absolutely

1 correct. I understand Your Honor's position about some
2 incarceration. I'm just asking Your Honor to give him as
3 little time as possible if that's what Your Honor
4 determines --

5 THE COURT: All right.

6 MR. MOORE: -- is the appropriate thing under the
7 factors.

8 THE COURT: Well, it's very difficult.

9 MR. MOORE: Yes, sir.

10 THE COURT: Because there's really not enough
11 time -- 15 months is not a huge deterrent as you have pointed
12 out. And below that is, you know, is going to be -- sending
13 him home is not any deterrent at all. I mean it would be, it
14 may be to him but for most people, most criminals it's not.

15 Many of my defense clients, the main question was,
16 "How much time am I gonna get?"

17 They would have pled to anything if it got -- for
18 less time. I mean, if they robbed -- if they had stolen some
19 money they would plead to murder if they got less time for
20 murder. They just wanted -- it was time -- not want to go to
21 jail.

22 MR. MOORE: Yes, sir.

23 THE COURT: So.

24 MR. MOORE: Well, is there anything else I can tell
25 Your Honor?

1 THE COURT: No. I think I know everything.

2 MR. MOORE: Thank you, Judge.

3 THE COURT: I think I know everything.

4 I tell you what I'm going to do here. I'm going to
5 go ahead and take a break here because this sentence is going
6 to implicate the other sentences, recognizing that there are
7 individual factors, the difference between zero and 15 months
8 is -- the Court is going to be giving so probably closing in
9 on similar type sentences in these cases. I've read
10 everything. I understand, I've seen a -- of this -- I've
11 read -- I did the CD in the next case. I've seen that. I
12 know you've got one individual that is pretty ill, but I don't
13 know, I guess they can give him all the medicines he needs in
14 the federal prison. If they can, then there needs to be some
15 prison time involved.

16 So let me just take -- I'm going to take a brief
17 recess.

18 (Recess at 2:52 until 3:03.)

19 THE COURT: Okay. If you would stand up, sir.

20 Anything further from the defense before sentencing?

21 MR. MOORE: No, sir, Your Honor. I appreciate your
22 time and attention to this matter.

23 THE COURT: Okay. Well, I've -- there's been a lot
24 of material been given to me, both in your matter and in
25 Mr. Swerden's matter, and in Ms. Saccamanno's matter. And

1 I've heard these folks testify, I know their testimony was
2 strong and certainly the jury convicted the two most culpable
3 of the ones they tried in the thing. I think it was a good
4 trial. I think I could see why the jury turned the wife lose.
5 But I thought it was well tried.

6 It's very, very difficult. Looking at the 3553(a)
7 factors you have to provide respect for the law, provide just
8 punishment for the crime. You have to protect the public from
9 further crimes of this defendant, as well as deter others who
10 might think this is a good idea.

11 And anytime money is involved, somebody is going to
12 think it's a good idea.

13 You want to avoid unwarranted sentencing disparity.
14 And you want to take into consideration the individual aspects
15 of each defendant. And one of the things about having good
16 lawyers in each of these cases is that you're able to -- you
17 all are able to maximize at least those individual
18 characteristics which allow for some mitigation.

19 The big thing here is these defendants cooperated
20 and your client cooperated. That's the biggest part of this
21 whole thing because without that it is very difficult for the
22 government to catch everybody that's involved. I do think
23 that there are too many -- I wish there was more involvement
24 in catching people out there. But as long as we have
25 politicized agencies in the United States we will always have

1 difficulties in getting all the wrongs righted that are out
2 there. Every time there's an election we get a new head of
3 some agency and they come up with some new ideas of who to
4 help and who to hurt.

5 In looking at this case, these cases have got to
6 be -- have got to be prosecuted. These guys are doing that on
7 a regular basis, and I commend what they're doing.

8 Today, I have individuals who start out with rather
9 low guidelines. I know some people might not think 33 to 41
10 is low, but they're pretty low in what I see.

11 I think I gave 180 months earlier today to somebody;
12 that's some real time.

13 But they did cooperate. It makes it difficult. And
14 I know they're doing their jobs. And I agree generally that
15 50 percent is where it really ought to go. But in these cases
16 it's hard for me to determine -- your client obviously has
17 cooperated and had an opportunity to cooperate more than they
18 had because he was aware of another fraud. So there's a
19 little bit of a double edged sword there.

20 But I think most of these folks are similarly
21 situated in this matter.

22 All right. The Court is going to grant the 5K1.1
23 motion of the government. It requires that the Court give
24 strong consideration with regard to the government's valuation
25 of the truthfulness, which it was truthful, the level of

1 assistance, which was substantial and sometimes extraordinary,
2 and its helpful nature and all of those things that the
3 government -- the government's in a better position than the
4 Court to know what was done, and the Court does that.

5 Then it is up to the Court to exercise its
6 independent judgment on what is the appropriate sentence in
7 the case.

8 So after some thought, some of it coming today,
9 although it was -- the Court had considered the possibility of
10 some reduction before today -- the Court is going to depart
11 for the full cooperation and truthful and Court-observed
12 cooperation of this defendant to level 12, which is a Zone C
13 sentence of 10 to 16. I'll sentence there as follows:

14 The Defendant Nicholas Fleming is hereby committed
15 to the custody of the United States Bureau of Prisons to be in
16 prison for a term of five months on each of Counts One and
17 Nineteen to be served concurrently.

18 I'm going to put the rest of this in supervised
19 release. Is that what I do? Or do I do that --

20 PROBATION OFFICER: Yes, sir.

21 THE COURT: Okay. The Court -- I'll just give you a
22 heads up. The Court is going to give ten months of home
23 confinement to make up the 15 months, which is the bottom end
24 of the guideline that the government had in this case. The
25 Court agrees that there needs to be a sentence there, and

1 there needs to be imprisonment, but I'm doing it in this way.

2 The Court recommends the Bureau of Prisons designate
3 a facility as close to Los Angeles, California, for service of
4 this sentence.

5 The Court further recommends the defendant be
6 allowed to participate in any educational or vocational
7 opportunities while incarcerated.

8 You're not going to have a lot of that because
9 you're only going to be there for five months wherever they
10 send you.

11 Upon release from imprisonment the defendant shall
12 be placed on supervised release for a term of 2 years.

13 This term consists of 2 years on each of Counts One
14 and Nineteen, all of these terms to run concurrently.

15 Within 72 hours of release from the custody of the
16 Bureau of Prisons the defendant shall report in person to the
17 probation office in the district to which the defendant is
18 released.

19 While on supervised release the defendant shall not
20 commit another federal, state or local crime, and shall comply
21 with the standard conditions of supervised release that have
22 been adopted by the Court in the Western District of North
23 Carolina and shall comply with the following additional
24 conditions:

25 The defendant shall not -- now, what type of

1 business is he in again?

2 MR. MOORE: Your Honor, he works as a marketing
3 representative for a tax company. They take in calls and they
4 try to work with the IRS to reduce someone's tax debt.

5 THE COURT: But is any part of this telemarketing at
6 all?

7 MR. MOORE: Beg a moment.

8 (Pause.)

9 He doesn't engage in what I would call
10 "telemarketing." The company markets it, and he is one of the
11 people who gets the phone call.

12 THE COURT: Is this one where they -- like they
13 advertise on TV that they can reduce your taxes?

14 MR. MOORE: Yes, sir. That's what it is.

15 THE COURT: Yeah. If they really can do it,
16 everybody ought to call them. I don't know if they can always
17 do it. Although taxes are necessary. The government runs on
18 taxes and the tooth fairy. If the tooth fairy is not pulling
19 the weight, the taxes have got to do it. Nothing else, no
20 other way to do it. You can call it something else. You can
21 call it a surcharge, anything you want to do. It's taxes. We
22 got to have them.

23 The defendant shall not engage in an occupation,
24 business profession or volunteer activity that requires or
25 enables the defendant to participate himself in telemarketing

1 without prior approval of the probation office.

2 That will take care if somebody else has to do that.

3 If he's just trying to help on the tax stuff.

4 My guess is if he's good at it they will hire him
5 back after five months. They might even hold the job for five
6 months for him, but they may not. If they don't, that's just
7 part of what happens. I can't let everybody with a good job
8 not go to jail.

9 Periodic drug testing mandated by the Violent Crime
10 Control and Law Enforcement Act of 1994 is hereby suspended.
11 The Court finds this offense is not drug related and the
12 defendant has no current or past history of substance abuse.

13 It is ordered the defendant shall pay the United
14 States a special assessment of \$200.

15 It is further ordered, having determined the amount
16 of restitution owed to each victim, that the defendant shall
17 make restitution pursuant to 18, United States Code, Section
18 3663(a) as directed to the United States.

19 The District Court Clerk is to -- do we have a list
20 of those?

21 PROBATION OFFICER: (Handing up paper writing to the
22 Court.)

23 THE COURT: All right. The Court is going to make a
24 -- attach as Attachment A to this judgment a list of the
25 constitutional -- the confidential -- confidential victims

1 restitution list. The Court -- it will not have addresses on
2 there so it will be a list of victims in the amount they are
3 owed in this case. The total amount of that is \$1,398,250.

4 Any payment that is not in full shall be divided
5 proportionately among the victims named. And the defendant is
6 jointly and severally liable with Robert Leslie Stencil, his
7 co-defendants in this case, and the co-defendants that were
8 sentenced in that case. Is there anybody -- or that were
9 tried in that case. Is there anybody other than the -- those
10 folks -- I think we tried three of them and we have these
11 three.

12 MR. BOWNE: Everyone else, with the exception of
13 Mr. Broyles, who is a fugitive, has pled guilty.

14 THE COURT: Okay. All right. And Mr. Broyles, if
15 he comes in, Mr. Broyles may be added to the list of those who
16 are required to pay this.

17 The Court further gives notice it may involve other
18 defendants who may be held jointly and severally liable for
19 payment of all or part of the restitution and may order such
20 payment in the future.

21 It is further ordered the victim's recovery is
22 limited to the amount of the loss, and the defendant's
23 liability for restitution ceases if and when the victims
24 receive full restitution.

25 The Court finds the defendant does not have the

1 ability to pay a fine or interest in this case.

2 The Court, having considered the factors noted in
3 18, United States Code, Section 3572(a), will waive payment of
4 a fine and interest in this case.

5 The defendant shall forfeit the defendant's
6 interests in any properties identified by the United States.

7 Do we have a list of those, anything as to this
8 defendant?

9 MR. BOWNE: There is no property for forfeiture,
10 Your Honor.

11 THE COURT: All right. Thank you.

12 Payment of the \$200 criminal monetary penalty is due
13 and payable immediately.

14 We can pay that immediately?

15 MR. MOORE: Yes, sir.

16 THE DEFENDANT: Yes, Your Honor.

17 THE COURT: Okay. All right. I believe that covers
18 everything.

19 Can the government think of anything else I need to
20 put in here?

21 MR. FENTON: Yes, Your Honor. I think we also have
22 to move to dismiss as to Mr. Fleming Counts Two through
23 Eighteen and Twenty through Twenty-nine of the Second
24 Superseding Indictment.

25 THE COURT: Okay. Two through Eighteen, and --

1 MR. FENTON: Twenty through Twenty-nine.

2 THE COURT: Twenty through Twenty-nine.

3 But anything else that I need to put in this
4 judgment? Anything else that the government thinks would help
5 victims or anything?

6 MR. FENTON: No, Your Honor.

7 THE COURT: All right. Okay.

8 MR. MOORE: Your Honor, could I ask you for two
9 quick points?

10 One, would Your Honor be willing to include in the
11 judgment or just include on the record a statement that his
12 current job does not constitute telemarketing as Your Honor
13 has defined it. Because what I don't want is a probation
14 officer in California go, "Hmm, how do we define
15 telemarketing?"

16 THE COURT: Well, he's not -- I think I have already
17 said on there it's apparent his performance that he is not
18 telemarketing. But I have no idea without knowing what the
19 company does if it's involved in telemarketing. I have no
20 idea whether they do that.

21 MR. MOORE: But as I understand it, Your Honor's
22 restriction is he can't personally be involved with
23 telemarketing.

24 THE COURT: That's it.

25 MR. MOORE: If the company itself does it, but he

1 doesn't, he's okay; is that right?

2 THE COURT: Yes. As long as he's not involved in it
3 himself and he's with a business, yeah, it's not a problem.

4 It's not a problem on supervision. It may be a
5 problem for him if the company he's working with is involved
6 in a criminal telemarketing enterprise of any kind and he's
7 helping that along. I think he understands he needs to be
8 careful about that.

9 MR. MOORE: He does, Your Honor.

10 THE COURT: If they're doing something illegal, the
11 fact that they are telemarketing is not going to be a problem.
12 Keeping him from telemarketing for a couple of years keeps him
13 out of the activity that he was involved in in this case,
14 which hopefully he will not be involved in in the future.

15 I do think this defendant and probably the other two
16 defendants having reviewed the heavy written information that
17 I've received from -- all you folks put a lot of stuff in
18 these cases -- are not going to be recidivists with regard to
19 this. But there is a component of this to try to deter other
20 people. I mean, these folks have got to get some publicity
21 out of these cases. I imagine Mr. Stencil's guidelines will
22 be higher than some of these others were.

23 MR. MOORE: Yes, I would imagine so.

24 Is it Your Honor's practice, do you ever recommend
25 specific institutions to the BOP or not?

1 THE COURT: Not without there being some reason to
2 do it.

3 For instance, I did today recommended Bennettsville
4 because that person wanted to -- at least they said they
5 wanted to -- get their vocational training in automotive and
6 electric, and Bennettsville has a program for automotive and
7 electric, and so I recommended for that. It doesn't mean that
8 the Bureau of Prisons will go along with it. But at least I
9 have a reason for doing that. Otherwise it's just close to
10 Los Angeles, California.

11 MR. MOORE: Yes, sir.

12 THE COURT: You want the one on the beach? What's
13 the island one out there? Is that the one he wants?

14 MR. MOORE: No, sir. There are two facilities, one
15 is called the Taft Correctional Institution, which I think the
16 BOP has a contract with, and then --

17 THE COURT: They're probably going to send him to a
18 camp.

19 MR. MOORE: And the other is Camp --

20 THE COURT: I hate to recommend something that's not
21 a camp. With five years -- five months, they're probably not
22 going to put him in Leavenworth.

23 MR. MOORE: No. I understand that he's probably
24 going to a camp as close to LA as possible.

25 THE COURT: Right, so.

1 MR. MOORE: And would Your Honor also consider
2 deferring his report date for a few months so that he can --
3 he needs to -- he's got an incontinence issue that he would
4 like to try to resolve --

5 THE COURT: I have read the letter. The letter
6 indicates the medical issues there. How long does he think
7 it's going to take to deal with these? Because I do not want
8 him to -- this sentence should not be something that causes
9 a -- further physical problems or death. This is not a death
10 sentence case.

11 MR. MOORE: Yes, sir. I would ask for six months
12 because I think I was told it would be resolved in six months
13 and that gives him the opportunity to earn some money and pay
14 that Medicare.

15 MR. FENTON: We would not object to six months if
16 that is appropriate under --

17 THE COURT: For medical reasons -- it appears, I
18 mean, the doctor in the letter talks about the fact that he
19 should return to normal -- this letter was this month -- in 12
20 to 18 months. So I think six months would not be a problem.
21 If he's still having problems you could contact me but you got
22 to have some backup --

23 MR. MOORE: Yes, sir, understood.

24 THE COURT: -- for me to go further than that.

25 Okay. The Court has a letter dated July 3, 2019,

1 which the Court will make -- let's make this a part of the
2 report, from the UCLA Department of Urology which indicates
3 the post problems that are associated with prostate surgery
4 and that this defendant will hopefully be completely normal in
5 12 to 18 months, and he is requesting an additional six months
6 before he reports.

7 The Court will honor that. And so the Court will
8 delay his report date --

9 MR. MOORE: I'd just say January 1st, Your Honor,
10 that's six months.

11 THE COURT: January 1st, not to be ordered to report
12 prior to January 1, 2020, because the medical reasons listed
13 in that report.

14 Okay. Is there any legal reason why this should not
15 be the sentence in this case?

16 MR. FENTON: No, Your Honor.

17 MR. MOORE: No, Your Honor.

18 THE COURT: All right. That is the sentence in this
19 case.

20 Now, Mr. Fleming, you can appeal this conviction and
21 sentence to the Fourth Circuit Court of Appeals.

22 If you wish to appeal, any appeal must be done in
23 writing. It must be done within 14 calendar days from when I
24 enter the written judgment in this case. Since this is Monday
25 it will probably be entered this week. If you wish to appeal

1 and cannot afford to appeal you may appeal at government
2 expense. I suggest you speak with your excellent attorneys
3 about these rights and whether or not you wish to exercise
4 them.

5 But do you understand your right to appeal as I've
6 just explained it to you?

7 THE DEFENDANT: I do, Your Honor. Yes.

8 THE COURT: Thank you. Anything further from the
9 defense?

10 MR. MOORE: No, sir, Your Honor.

11 THE COURT: Anything further from the government?

12 MR. FENTON: No, Your Honor.

13 THE COURT: All right. Thank you. This matter is
14 concluded.

15 THE DEFENDANT: Thank you, Your Honor.

16 (The matter is concluded at 3:24.)

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1 UNITED STATES DISTRICT COURT
2 WESTERN DISTRICT OF NORTH CAROLINA
3 CERTIFICATE OF OFFICIAL REPORTER

4 I, Laura Andersen, Federal Official Court Reporter,
5 in and for the United States District Court for the Western
6 District of North Carolina, do hereby certify that pursuant to
7 Section 753, Title 28, United States Code that the foregoing
8 is a true and correct transcript of the stenographically
9 reported proceedings held in the above-entitled matter and
10 that the transcript page format is in conformance with the
11 regulations of the Judicial Conference of the United States.

12 Dated this the 19th day of February 2020.

13 S/Laura Andersen
14 Laura Andersen, RMR
15 Federal Official Court Reporter